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BVI Securities and Investment Business Act 2010: Balancing prudent regulations in an evolving international context

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The most significant development in the British Virgin Islands (BVI) during the preceding 12 months was the introduction of securities legislation and associated regulation in the jurisdiction. Against the backdrop of emerging international standards of regulation, the BVI, through the recent enactment of the Securities and Investments Business Act, 2010 (Siba), has bolstered its regulatory regime and demonstrated its commitment to fulfilling its obligations under the International Organisation of Securities Commissions and complying with international standards of best practice.

Siba, touted by the BVI Financial Services Commission (FSC) as the “most significant change to the regulatory regime for investment business in the Territory since the Mutual Funds Act, 1996”, introduces securities and financial markets regulation for the first time into the BVI and underscores the BVI’s commitment to developing a prudent regulatory regime for investment business activities.

Siba was enacted on 23 April 2010 and largely came into force on May 17 2010. Its four main objectives are:

- The introduction of a new investment business licensing regime to regulate persons carrying on investment activities in or from within the BVI;
- The adoption of restrictions on, and regulation of, public issues of securities into the BVI;
- The repeal of the Mutual Funds Act, 1996 and replacement of with Part III of Siba and the Mutual Funds Regulations and Public Funds Code; and

- The introduction of a market abuse regime which provides for offences of insider trading, circulating misleading information and market manipulation.

Main features of Siba
Investment business

Any person conducting “investment business” in or from within the BVI will be required to hold a licence from the FSC expressly authorising the relevant category of investment business. The scope of Siba extends to:

- any BVI Business Company which carries on investment business anywhere in the world; and
- any person who solicits a person in the BVI for the purpose of offering to provide a service that constitutes investment business.

Descriptions of the activities which constitute “investments” and “investment business” are contained in Schedule 1 of Siba. Investments are defined broadly, and include: shares, interests in a partnership, fund interests, debentures, instruments giving entitlement to shares, interests or debentures, certificates representing investments, options, futures, contracts for differences, long-term insurance contracts, rights and interests in investments and anything specified as an investments in the Investment Business Regulations.

Investment activities include dealing in investments, arranging deals in investments, managing investments, providing investment advice, providing custodial services with respect to investments, or providing administrative services with respect to investments and operating an investment exchange. Schedule 2 of Siba details certain “excluded activities” and which will not constitute investment business and “excluded persons” who are excluded from the requirement of holding a licence to conduct investment business.

Once licensed, Siba requires a licensee to implement a number of systems and controls for the operation of its business and for con-

trolling corporate governance, advertisements and conduct and administration of the business.

Public issues of securities

Siba introduces a new regime to regulate the offering of securities to “the public” in the BVI. Unlike the other parts of Siba, this Part is expected to come into force in the third quarter of 2010. Under Part II of Siba, except in limited instances, no security may be offered to the public unless it is within a prospectus registered with the FSC and complies with requirements to be outlined in the Public Issuers Code.

In practice, due to the existence of a number of exclusions where an offer is made to qualified investors and given that issues of securities by mutual funds registered or recognised under Siba do not fall within the new public issuer regime, only a few issues of securities are likely to fall within the scope of this new regime.

Mutual funds

Part III of Siba establishes the general framework for the regulation of public, professional and private mutual funds. It repeals the MFA and introduces subsidiary regulations, namely the Mutual Funds Regulations, 2010 and the Public Funds Code. Importantly, the enactment of Siba does not significantly alter existing fund business, but merely codifies the existing FSC policies and practices. The following new requirements introduced by Siba are noteworthy:

- a general audit requirement for private and professional funds (although funds may apply for exemption from this requirement);
- the \$100,000 minimum initial investment required for a professional fund will apply to all investors save for certain exempt investors (previously the requirement was for a majority of the investors to invest at least \$100,000);

(iii) a requirement that all funds, managers, administrators and other licensees have an authorised representative resident in the BVI, unless they have a “significant management presence” in the BVI;

(iv) a requirement to notify the FSC of various matters including changes of directors and functionaries and updates to offering documents;

(v) a requirement for all funds to have at least two directors, one of whom must be an individual; and

(vi) a general requirement for private and professional funds to have an offering document to appoint a manager, administrator and custodian.

Market abuse

Part V of Siba introduces a market abuse regime which contains prohibitions on individuals, based in the BVI, who conduct insider dealing, carry on market manipulation or make misleading statements relating to investment business. Fines of up to \$50,000 and maximum prison terms of three years may be levied on convicted persons.

Siba will undoubtedly have very important implications on the structuring of transactions involving BVI entities. To facilitate a smooth transition for BVI entities which were on the date of Siba coming into force either licensed under the MFA or carrying out activities which constitute “investment business” under Siba, Siba contains useful transitional provisions, including timelines for existing licensees to become fully compliant.

Financial and corporate

Recommended firms

Tier 1

Conyers Dill & Pearman
Harneys
Walkers

Tier 2

Maples and Calder
Ogier

Tier 3

Appleby
Forbes Hare

Tier 4

Dancia Penn & Co
Farara Kerins
Hewlett Beck & Arad
McW Todman & Co
O’Neal Webster

In 2009 the British Virgin Islands was thrust into the media spotlight after being portrayed as a haven for fraud, as well as lacking transparency and regulatory oversight. Although lawyers attest that these allegations are false, the damage from Bernard Madoff’s Ponzi scheme have not helped the jurisdiction’s reputation in the international community. “Last year offshore centres were facing a lot of criticism,” says one partner.

One of the notable new pieces of legislation introduced in light of regulatory inspections by the International Monetary Fund (IMF) was the Securities and Investment Business Act, which was enacted in April 2010 with the aim of tightening regulation on investment funds. “Funds are in a different regulation environment now,” describes one partner.

The economy in the British Virgin Islands has experienced a modest recovery since the crisis but not enough to return lawyers back to deal flow of glory days. “We’re back to doing deals but not the same quantum of deals,” says one partner.

Lawyers were occupied with restructuring work in the first half of 2009 which tapered off in the latter half of the year in favour of M&A deals. “Restructuring is phasing out now,” says one partner. “M&A work is back on the agenda.” Partners also describe some uptick in private-equity transactions for the financing of select deals.

Despite being a slow year for the formation of new funds, funds lawyers stayed occupied with restructurings, especially early in the year, and liquidity work. “That was really our bread and butter work,” says one partner. The biggest liquidation in the jurisdiction for the year came from Madoff’s Fairfield Sentry feeder fund.

The BRIC economy has been a huge asset for BVI lawyers in terms of increasing deal flow. “We’re seeing a lot of work coming from emerging markets like Russia, Brazil, India and China,” says one partner. Lawyers are now viewing such countries as a viable part of their client base.

Despite contractions and redundancies by some firms, others have been able to open offices in jurisdictions like Cyprus and Mauritius to accommodate emerging market investors and begin to transition from their historic reliance on North American and European clientele.

Conyers Dill & Pearman

Conyers Dill & Pearman has climbed a rung in the rankings after a round of positive peer feedback. Competitors were particularly complimentary of the talents of Robert Briant. “Robert Briant is the key player at Conyers,”

says one peer. “He’s a very important person for them in a number of different areas.”

One client adds about Robert, “The really good thing about Robert is that having come from the North American marketplace he understands what we want when we need help in the BVI.”

Rivals comment that the firm would benefit from making more senior additions to the team, especially when the hiring environment improves in the BVI. Conyers is also noted as one of the only firms in Cayman in 2009 that was able to hold onto all of its lawyers in a climate of redundancies. Conyers is also the only offshore firm with an office in Brazil.

Taking advantage of its Brazilian office, Briant advised Vale, the Brazilian mining company, on the BVI legal aspects its \$1.6 billion asset purchase from the Australian mining company Rio Tinto. As part of the transaction, Rio Tinto sold its \$750 million iron ore mine in Corumbá to Vale. The deal is just one part of Rio Tinto’s plan to sell its iron ore and potash mines in South America to Vale.

Briant also acted as counsel for IK Investment Partners, the European private-equity firm, on the buyout of Vistra Holdings. The buyout was backed by the Netherlands investment holding company, Reggeborgh Groep. IK now owns a majority stake in Vistra.

Leading lawyers

Robert Briant

Harneys

Harneys is the oldest and largest firm in the BVI, with a reputation for housing some of the best corporate and funds lawyers in the region. The firm also has a commitment to its local and international clients with additional resources in Cayman, London, Hong Kong, and Cyprus. The firm is also scheduled to expand its Latin America presence by opening an office in Uruguay later in 2010.

In November 2009, Harneys advised an affiliate of Virgin Galactic in connection with the BVI law aspects of the strategic partnership between Abu Dhabi’s Aabar Investments and Sir Richard Branson’s Virgin Group. The transaction involved Aabar’s investment of \$280 million and acquisition of a 32% stake in Virgin Galactic’s holding company.

Harneys also acted as counsel on another high-profile deal that month involving the popular software application Skype. Led by partner Colin Reigals, the team served as local counsel to Silver Lake private-equity group regarding its \$1.9 billion acquisition of a majority stake in Skype Technologies from eBay.

One client says of Reigals, "He's very responsive and gives good quality advice."

Leading lawyers

Leonard Birmingham
Colin Riegels
Peter Tarn
Ross Munro

Walkers

Walkers is one of the most distinguished firms in Cayman with a strong commitment to cross-border work. The firm has global offices in the BVI, Cayman, Hong Kong, London, Singapore, Jersey, and Dubai. It also has multi-jurisdictional capabilities with lawyers versed in British Virgin Islands law, Cayman Islands law, Dubai International Finance Centre law and Jersey law. Walkers enjoys a client base which includes international banks and financial institutions, investment funds and multinational corporate businesses.

"When I think of the Caribbean I think of two firms and one is Walkers. My preference has always been for Walkers," says one client.

The firm gained a position on one of the most high profile M&A transactions in the oil & gas sector for 2009. Led by Richard May, the corporate team advised the holding company Central Asia Petroleum (Cap) in connection with its disposal of its stake in JSC MangistauMunaiGaz (MMG) to Mangistau Investments. Mangistau Investments is a joint venture between China Natural Petroleum Corporation (CNPC) and KazMunaiGas (KMG). The transaction concluded for a total of \$3.3 billion, including oil and gas field assets.

Jack Boldarin advised Altimo Holdings & Investments on BVI corporate law regarding the merger of Vimplecom with Kyivstar. Altimo and Telenor agreed to combine with their holdings in VimpelCom and Kyivstar to create a New York-listed entity worth an excess of \$23.8 billion. The new company, VimpelCom, will create one of the largest mobile operators in the emerging markets.

Leading lawyers

Jack Boldarin
Richard May
Christopher McKenzie
Catherine Ross

Maples and Calder

Despite its loss of key lawyers like José Santos and Rob McIntyre, Maples and Calder still retains a solid standing in the market among peers. One sign of the firm's positive traction in the market is the fact that Maples has dou-

bled the numbers in its BVI office since its founding in 2004.

One of Maples' highlights this year was advising Fortis on the disposal of its tax arm to Waterland Private Equity Investments. The firm advised on elements of local law for the sale as well as the regulatory approvals that transferred control to Waterland. The Fortis mandate came through Dutch law firm DeBrauw Blackstone Westbroek.

The firm also represented Corporación Andina de Fomento and the International Finance Corporation (IFC) on the BVI legal aspects of Colinversiones \$150 million project financing facility from three development agencies, including Corporación Andina and IFC, to upgrade its Termoflores power plant.

Leading lawyers

Clinton Hempel

Ogier

Ogier has built a strong reputation in the BVI for its corporate and funds work. In 2009 it advised on more public takeovers than its competitors in the region and landed a position as counsel on the largest transaction in the BVI for the year.

The firm benefits from relationships with regulatory authorities, the BVI government, and its fiduciary arm, Ogier Fiduciary Services BVI.

A year after recruiting Ray Wearmouth away from rival Harneys, Ogier appointed another Harneys lawyer to partnership in the firm, Zac Lucas. Lucas is the latest addition in a series of significant lateral hires from Harneys, all following Wearmouth's lead in going over to Ogier.

Ray Wearmouth led the corporate team in representing Rusal, the Russian aluminium company, on the BVI elements of its \$18 billion debt restructuring. The restructuring involved over 50 banks as lenders, who are estimated to hold \$7.4 billion of Rusal's debt, and is considered to be the largest in the BVI for 2009.

Wearmouth also led a team advising cement company Cemex on the BVI elements of its \$3 billion restructuring of debentures. The exchange is expected to assist the company in lowering its debt-servicing costs and help it save approximately \$750 million.

Leading lawyers

Ray Wearmouth
Simon Schilder

Other ranked firms

Although Appleby's BVI presence may not be as strong as some of its competitors, the name alone is certainly respected in the offshore community. The firm's strong relationship with its global offices has enabled it to tap into Appleby's key client pool, which includes financial institutions like Fortis Bank.

In September 2009, the firm acted as BVI counsel to Fortis Bank Nederland on its refinancing of a \$600 million revolving loan to the energy trading company Gunvor Internation. Three BVI companies acted as corporate guarantors on the transaction.

Appleby served as BVI counsel to Fortuna Development Corporation and its associated BVI companies in February 2010 in connection with the refinancing of its loan with Taipei Fubon Commercial Bank. The firm was involved in finalising a facility agreement between Fortuna, the co-borrower and corporate guarantor with Taipei Fubon for the refinancing of a \$130 million syndicated loan.

Leading lawyers: Michael Burns and Valerie Georges-Thomas

Forbes Hare has been gaining ground in the BVI and its competitors have taken notice. "I think they are a pretty good, actually," says one peer. After a round of strong feedback, the firm has moved up into tier three.

Besides commending the firm's capabilities on a whole, competitors also noted its efforts to hire new talent. In January 2010, Forbes Hare recruited José Santos from Maples and Calder. "That was a really good hire for them" says a peer. "They are definitely getting their act together."

William Hare is advising Kenneth Kryz and his liquidation team in connection with Madoff's largest feeder fund, Fairfield Sentry. Fairfield Sentry filed for BVI bankruptcy protection in April 2009 and recently filed Chapter 15 protection in Manhattan as of June 2010. It has between \$100 million and \$500 million in assets as well as \$100 million to \$500 million in debt. The fund is worth a total of approximately \$7.8 billion and its insolvency is the largest in the BVI.

Leading lawyers: William Hare, Robert Nader, José Santos and Daniel Waldek